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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 594

GLORIA MUSE, wife of
RUSSEL MILLS,

Petitioner,

versus

UNITED STATES CASUALTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SHERMAN F. RAPHAEL,
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HAUSER PRINTING CO., INC., NEW ORLEANS

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	4
Conclusion	6
Certificate	7
Appendix A	9
Appendix B	12
Appendix B-1	16
Appendix C	18
Appendix D	19

AUTHORITIES

Cases

Anderson v. Simmons, 75 So. 2d 34 (La. App. Orl.)	5
Bender v. Pfaff, 282 U.S. 127	4
Godchaux v. United States, 102 F. Supp. 261 (D.C. La.)	5
McCullough v. United States, 134 F. Supp. 673 (D.C. La.)	5
Payne v. State Farm Mutual Automobile Insurance Company, 266 F. 2d 63 (5 Cir.)	4
Rogers v. Burglass, 171 So. 106 (La. App. Orl.)	5
Succession of Helis, 226 La. 133, 75 So. 2d 221	5

Statutes

Federal Rules of Civil Procedure, rule 18(a), 28 U.S.C.	2, 16
28 U.S.C. 1332 (a) (1)	2, 16
Article 695, Louisiana Code of Civil Procedure	17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 25, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not yet reported. The text of this opinion, however, is found in Appendix A hereto. The District Court's memorandum opinion is found in Appendix B hereto.[1]

[1] Although the District Judge did not originally render a written opinion, the record on appeal to the United States Court of Appeals for the Fifth Circuit contains a memorandum which was incorporated into the record by a subsequent motion of the Respondent and order of the District Judge, to be his written reasons for judgment. The motion and order is found in Appendix B-1 hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1962, and motion for an extension of time in which to file a petition for a writ of certiorari was filed on October 23, 1962. The order extending time in which to file a petition for a writ of certiorari was granted on October 25, 1962, extending the time to and including November 8, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

May a married woman, living with her husband under the community property regime in Louisiana, procedurally aggregate a claim for damages to community property, in which she has a vested substantive property right, with a claim for personal injuries, in order to satisfy the jurisdictional amount required under 28 U.S.C. § 1332.

STATUTES INVOLVED

Fed. Rules Civ. Proc. rule 18(a), Title 28 U.S.C.; Title 28 U.S.C. § 1332(a)(1). Text of the above articles appears in Appendix C.

Applicable Louisiana Statutes appear in Appendix D

STATEMENT

This direct action suit[2] for damages was instituted by Petitioner as a result of personal injuries and property damage sustained when her automobile, owned by the community of acquets and gains existing between herself and her husband, was struck in the rear by an automobile

[2] R.S.La. 1950. Title 22 § 655.

driven by Respondent's assured. Jurisdiction was predicated on 28 U.S.C. § 1332, Petitioner being a citizen of Louisiana and Respondent a corporate citizen of New York. In her complaint, Petitioner alleged personal injury in the amount of $30,000.00, $150.00 for her loss of wages and $70.00 damage to personal property. This last figure represents actual cash lost to Petitioner for damages to her automobile.[3]

Respondent subsequently filed a Motion to Dismiss and Alternatively Motion to Strike on the grounds that its policy provided only for $10,000.00 liability for injury to one person. The District Court upheld Petitioner's contention that the policy also provided for coverage up to $5,000.00 for damages to personal property and dismissed Respondent's motion, as its total exposure was $15,000.00. Respondent then filed its answer, a general denial of Petitioner's complaint.

Respondent then took the Petitioner's discovery deposition and based upon her statements that her automobile was purchased out of funds owned by Petitioner and her husband, and, therefore, community property, filed another Motion to Dismiss and Alternatively for Summary Judgment.

Notwithstanding production, at the hearing on this motion, of her husband's sworn affidavit specifically authorizing Petitioner to sue for the damages to the automobile, the District Court granted the summary judgment.[4]

Respondent then appealed to the United States Court

[3] This $70.00 loss is the amount Petitioner had to pay out under the deductible clause of her personal automobile insurance policy.

[4] Appendix B.

of Appeals for the Fifth Circuit which affirmed the decision of the District Court.[5]

REASONS FOR GRANTING THE WRIT

1. The opinion of the Court of Appeals for the Fifth Circuit conflicts either directly or in principle with applicable decisions of this Court, its own decisions and the decisions of the Courts of Louisiana.

(a) Conflict with decisions of this Court.

It was well established in *Bender v. Pfaff*, 282 U.S. 127, by this Court, that a wife in Louisiana has a vested interest in community property equal to that of her husband. That interest is an immediate property right, not a mere expectancy during the marriage.

The decision of the Court of Appeals here is to the effect that such interest or ownership does not vest immediately.

(b) Conflict with decisions of the United States Court of Appeals for the Fifth Circuit.

In its opinion, the Court of Appeals declared that the instant decision was based upon the decision of *Payne v. State Farm Mutual Automobile Insurance Company*, 266 F. 2d 63 (5 Cir.).

Petitioner respectfully submits that *Payne* is completely at odds with the case at bar, and its principle, that a father may not accumulate *his son's separate* claim with *his own separate* claim to satisfy the jurisdictional amount of 28 U.S.C. § 1332, is not at all analagous to the claim here where a wife is seeking to accumulate *her*

[5] Appendix A.

separate claim for personal injuries with *her separate* claim for property damages. See also *McCullough vs. United States*, 134 F. Supp. 673 (D.C. La.) and *Godchaux vs. United States*, 102 F. Supp. 261 (D.C. La.).

(c) Conflict with decisions of the Louisiana Courts.

The Louisiana Supreme Court has stated that title to one-half of community property is vested in the wife from the very moment of its acquisition, and no matter in whose name it was acquired. *Succession of Helis*, 226 La. 133, 75 So. 2d 221. This basic premise is now settled within Louisiana and has been respectfully followed by the Federal Courts, as cited, e.g., *supra*.

The Courts of Louisiana have allowed a wife, living with her husband, to sue as the only party plaintiff to enforce a right of marital community. *Anderson v. Simmons*, 75 So. 2d 34 (La. App. Orl.) reh. den., almost on all fours with the instant case, permitted the wife to sue for the community. And in *Rogers v. Burglass*, 171 So. 106 (La. App. Orl.), the wife was again the sole plaintiff enforcing a community debt.

These Louisiana decisions are clearly in conflict with the decision of the Court of Appeals for the Fifth Circuit in this case.

2. Petitioner specifically asked the Court of Appeals to pass alternatively on her right to at least sue to protect her share of the community property, i.e., her vested property right.[6] This was in no way answered by the opinion of the Court of Appeals. In view of that Court's refusal to allow petitioner to maintain an action on behalf of the community, it should have passed on her alternative plea.

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[6] Petitioner's appeal to the United States Court of Appeals, p. 2.

3. The questions presented by this petition, clearly, are of importance sufficient for this Court to hear and judge the merits of the appeal. To allow the decision of the Court of Appeals for the Fifth Circuit to remain, this Court would bar countless plaintiffs from the right to seek their relief in the federal forum if they so chose.[7]

In addition, the presence of contradictory opinions within the Federal Courts and within the Fifth Circuit itself is detrimental to our basic premise that the law should be applied uniformly. Further, the *Erie Doctrine* makes it incumbent upon Federal Courts to follow State law.

4. Based upon the herein reviewed decisions of this Court, the Court of Appeals for the Fifth Circuit, as well as the Louisiana Supreme Court and lower Courts, it is submitted that Petitioner's position is in accord with applicable and prevailing rules of law. Petitioner further submits that it is reasonable to expect this Court, after a hearing of the merits of the appeal, to decide in her favor.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SHERMAN F. RAPHAEL,
1040 Maison Blanche Building,
New Orleans 16, Louisiana.

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[7] The Federal Courts could then only be appealed to by an injured plaintiff where the tort feasor carried public liability insurance written by a foreign corporation in excess of $10,000.00 and $20,000.00. Since the bulk of automobile public liability insurance is written with limits of $5,000.00 and $10,000.00 and some up to $10,000.00 and $20,000.00—the appearance of the victims of reckless motorists would be rare indeed in Louisiana Federal Courts.

CERTIFICATE

I hereby certify that a copy of the above Petition for a Writ of Certiorari has been served upon the defendant by mailing a copy to its attorney of record, Thomas C. Wicker, Jr., Esq., through the United States Mail, 1st class postage prepaid, at his office 601 American Bank Bldg., New Orleans, Louisiana, this 7th day of November, 1962.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19505

GLORIA MUSE, wife of RUSSELL MILLS,
Appellant,

versus

UNITED STATES CASUALTY COMPANY,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 25, 1962)

Before TUTTLE, Chief Judge, RIVES and BROWN, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a judgment by the trial court dismissing a direct action suit against the appellee Insurance Company for want of the $10,000 jurisdictional amount. The complaint alleged personal injury to the wife, the plaintiff, of $30,000, $70 damage to the vehicle operated by the plaintiff, and $150 for her loss of wages. It is not disputed that the automobile was owned by the community of "acquets and gains," as known in the Louisiana jurisprudence, existing between the plaintiff and her husband, Russell Mills. So, too, did the wife's lost wages belong to the community.

The question here on appeal is whether the court erred in its determination that where the limit of liability of the insurance carrier was $10,000 for the personal injury claim, a wife, suing for her personal injury, could not combine this claim with the $220 item belonging to the community in order to reach the $10,000 jurisdictional amount to satisfy the requirement of 28 U.S.C. § 1332. We conclude that the trial court properly held that the complaint was subject to dismissal for failure to assert the jurisdictional amount.

The Louisiana Code, Article 2334, expressly provides that a suit by a wife for personal injuries received in an accident constitutes her separate property. On the other hand, it is clearly the settled jurisprudence of the State of Louisiana that the husband is head and master of the community, and he is its only legal representative in suits by or against the community. *Borne v. LaTerre Co.*, 5 Cir., 222 F. 2d 453. Under Louisiana law, it has been held that the husband alone is authorized to sue for the recovery of damages to a motor vehicle which is community property. *Butler v. Mississippi Foundation Co.*, 175 So. 887; *Smith v. Brock*, 200 So. 342; *Hollinguest v. Kansas City Southern Railway Co.*, 88 F. Supp. 905; *Rollins v. Beaumont-Port Arthur Bus Lines*, 88 F. Supp. 908.

The appellant, however, points to Article 695, of the Louisiana Code of Civil Procedure, which became effective on January 1, 1961. This Article reads as follows:

> "A wife, as the agent of her husband, may sue to enforce a right of his separate estate, or a right of the marital community, when specially authorized to do so by her husband."

It is plain from the reading of this statute that it does not purport to change ownership of the type of claim

here in question. It merely authorizes a procedura step in that the wife may sue as agent for her husband who otherwise would be the only person entitled to sue on behalf of the community. The official revision comments appended to Article 695, contain the following language:

> "This Article completely spells out *the procedural capacity* of the wife to sue *as agent* to enforce a community right, when authorized to do so by the husband." (Emphasis added.)

In view of the fact that the statute says that she may act as agent *for her husband*, it is clear that there has been no change in the traditional jurisprudence of the state that reposes in the husband the power to enforce claims on behalf of the community. We conclude, therefore, that there has been no such change as would vest authority in the wife, *in her own right*, to bring an action for damages to the automobile or for recovery for her loss of wages. As this Court has stated in *Payne v. State Farm Mutual Automobile Insurance Company*, 5 Cir., 266 F. 2d 63:

> "When a father sues on his own behalf and in behalf of his minor child, each claim, the claim of the father and the claim of the child, must satisfy the requirements of jurisdictional amount."

We conclude that the principle annnounced in the Payne case is binding here, and that the trial court properly dismissed the suit on the ground that the husband's claims, for which the wife sought to sue, could not be added with those of the wife for the purpose of constituting the amount sued for under the jurisdictional statute.

The judgment is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 10325
Civil Action

GLORIA MUS , Wife of RUSSELL MILLS
Vs.
UNITED STATES CASUALTY COMPANY

MEMORANDUM

The plaintiff, a married woman, filed this action against the defendant, United States Casualty Company, for $30,220.00. Of this amount, $70.00 is claimed as damages to personal property. The defendant filed a copy of its insurance policy into the record. The policy reflects a $10,000.00 limitation for personal injuries sustained by any one party and insures against property damage to an amount not exceeding $5,000.00.

Defendant filed a motion asking this Court to strike that portion of plaintiff's demand which was in excess of the policy limits. Its motion was granted. The action is now comprised of a demand for $10,000.00 for personal injuries and of a demand for $70.00 for damages to property.

Defendant has now filed a motion to dismiss, and, alternatively, a motion for summary judgment. The basis of its motion is that plaintiff's claim for property damage is one belonging to the community existing between

and her husband, and, thus, may be brought only by the head of the community, her husband.

In support of its motion, defendant has filed into the record a copy of a deposition taken of the plaintiff. In her deposition, she stated that the property allegedly damaged in the amount of $70.00 was the automobile which she was operating at the time of the accident. She stated that this automobile was purchased during her marriage by her husband from non-segregated funds apparently accumulated during their marriage.

The automobile operated by the plaintiff at the time of her accident belonged to the community of acquets and gains existing between she and her husband.

The plaintiff then filed into the record an affidavit in which her husband states "That at all times pertinent thereto, the plaintiff, Gloria Muse, his wife, was and is his agent, and that he especially authorized his wife to sue for claims of the marital community, as his agent."

Prior to January 1, 1961, a wife did not have the capacity to file suit seeking redress for damages caused to the community existing between herself and her husband. *Taylor vs. Dunn*, 1957, 233 La. 617, 97 So. (2) 415; *Mitchell vs. Dixie Ice Co.*, 1925, 157, La. 383, 102 So. 497; *Prats vs. Prats*, App. 1955, 77 So. (2) 205.

On January 1, 1961, a new Code of Civil Procedure became effective in Louisiana. Article 695 of this Code provides as follows:

> "A wife, as the agent of her husband, may sue to enforce a right of his separate estate, or a right of the marital community, when specially authorized to do so by her husband."

By legislative fiat, a wife now has the capacity in Louisiana to enforce a right of the community when specially empowered to do so by her husband. (Also see official revision comments appendaged to L.C.C.P. Art. 695).

The only question remaining is: May a wife, bringing an action in Federal Court under 28 U.S.C. 1332, cumulate her claim on behalf of the community with her claim on behalf of her personal estate to give her the requisite jurisdictional amount to maintain her suit when both claims arise out of the same occurrence and involve common question of fact?

The Louisiana Courts have held that a wife's one-half interest in community property is more than a mere expectancy. In discussing the nature of this interest, the Louisiana State Supreme Court has held:

> "The title for half of the community property is vested in the wife the moment it is acquired by the community or by the spouses jointly, even though it be acquired in the name of only one of them. Rev. Civ. Code, art. 2420." Phillips v. Phillips, 1926. 160 La. 813, 107 So. 584. See also Bender v. Pfaff, 1930, 282 U.S. 127; Fernandez v. Wiener, 1945, 326 U.S. 340.

The wife has always had a proprietary interest in community property even during the existence of the community. Article 695 of the Louisiana Code of Civil Procedure now gives to her the capacity to redress wrongs on behalf of the community, as agent of her husband, when authorized to do so by the husband.

This authorization was given to the wife by her husband in the instant case. She has, what is termed in Louisiana, both a right of action and a cause of action

to bring this suit on behalf of the community. She may not, however, cumulate the claim brought in her capacity as agent of her husband for damages on behalf of the community with her claim on behalf of her separate estate in order to satisfy the jurisdictional amount required by 28 U.S.C. 1332.

The motion filed by the defendant, United States Casualty Company, to dismiss, will be GRANTED.

APPENDIX B-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
NUMBER 10325
DIVISION "A"

GLORIA MUSE, wife of RUSSELL MILLS,
Plaintiff

VERSUS

UNITED STATES CASUALTY COMPANY,
Defendant

On motion of UNITED STATES CASUALTY COMPANY, through its undersigned counsel and,

ON SUGGESTING TO THIS COURT, that there was inadvertently omitted from the record of the case transmitted to the United States Court of Appeals for the Fifth Circuit, Number 19,505 entitled "Gloria Muse, wife of Russell Mills, Appellant vs. United States Casualty Company, Appellee" the certified copy of policy of insurance number FA-004623 issued by the UNITED STATES CASUALTY COMPANY to MISS HARRIET SANDERS, effective September 1, 1959 to September 1, 1960 and that said policy of insurance is essential to a determination of the issue presented for decision by the said Court of Appeals for the Fifth Circuit and should be transmitted in the original to the Clerk of the Court of Appeals for the Fifth Circuit to be included in the record of that cause and,

ON FURTHER SUGGESTING TO THE COURT, that this Court gave written reasons, which through in-

advertence were not signed, for judgment dismissing plaintiff's complaint on November 29, 1961 which were inadvertently omitted from the record of this case on appeal; that said written reasons for judgment were entitled "Memorandum" but nevertheless reflect the written opinion of this Court and should be included in the record of this case on appeal.

IT IS ORDERED BY THE COURT, that the certified copy of policy of insurance Number FA-004623 issued by the UNITED STATES CASUALTY COMPANY to MISS HARRIET SANDERS effective September 1, 1959 to September 1, 1960, be forwarded in its original form to the Court of Appeals for the Fifth Circuit to be included in the record of this case on appeal.

IT IS FURTHER ORDERED BY THE COURT, that the written reasons for judgment rendered by this Court on November 29, 1961 entitled "Memorandum" constitute a written opinion by this Court for its action in dismissing plaintiff's complaint and that said written reasons for judgment should be forwarded to the Court of Appeals for the Fifth Circuit to be included in the record of this case on appeal.

NEW ORLEANS, LOUISIANA
MAY 14, 1962.

(Signed) HERBERT W. CHRISTENBERRY
JUDGE

SUBMITTED BY:

(s) THOMAS C. WICKER, JR.

THOMAS C. WICKER, JR.
601 American Bank Building
New Orleans 12, Louisiana
Attorney for UNITED STATES CASUALTY COMPANY, Defendant-Appellee

APPENDIX C

Rule 18(a) Federal Rules of Civil Procedure.

"(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. * * * "

Title 28 U.S.C., § 1332 (a)(1)—Diversity of Citizenship—Amount in Controversy—* * *.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between—

(1) citizens of different States; * * * "

APPENDIX D

Article 695, Louisiana Code of Civil Procedure.

> "A wife, as the agent of her husband, may sue to enforce a right of his separate estate, or a right of the marital community, when specifically authorized to do so by her husband."